SERVED: December 9, 1993

NTSB Order No. EA-4035

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of November, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ROBERT N. BEIRNE, Respondent.	Docket SE-11813

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on March 2, 1992, following an evidentiary hearing.[1] The law judge affirmed an amended order of the Administrator revoking respondent's medical certificate and suspending his commercial pilot

[1]The initial decision, an excerpt from the hearing transcript, is attached.

certificate for 60 days for violating 14 C.F.R. 67.20(a)(1).[2] We deny the appeal.

Respondent has admitted that in 1984 he was convicted of possession of marijuana. In 1985, while he was still on probation,[3] he filled out his first medical application (Tr. at 21) and, in answer to question 21w (had he ever had or did he now have a record of other than traffic convictions), he answered "no." Respondent testified at the hearing to his belief that, under the circumstances of his conviction, there was to be no record of it.[4] The initial decision's affirmance of the Administrator's order reflects the law judge's failure to believe either of respondent's explanations. Tr. at 96.

On appeal, respondent argues that the Administrator's order should be dismissed because the Administrator failed to prove that respondent had actual knowledge of the falsity of his

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[2] § 67.20(a)(1) provides:

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

[3] Respondent's 10-year jail sentence was reduced, via a plea bargain, to 30 days and 5 years' probation. Exhibit C-1.

[4] In a letter to the FAA, respondent stated otherwise: that he believed his cooperation with the police would result in "punishment but not a conviction." Exhibit R-1. At the hearing, respondent testified that he meant no difference in using these different terms.

Respondent also testified at the hearing that he didn't remember if he had read the form and, whenever he fills out medical history, the answer is always "no." Tr. at 26.

statement.[5] Direct evidence of actual knowledge, however, is not required, and is rarely available. Circumstantial evidence is typical and, as the law judge recognized, must be "so compelling that no other determination is reasonably possible." Tr. at 96.

The law judge observed respondent's demeanor and questioned him extensively regarding his completion of the application, as did both counsel. There was sufficient evidence to decide whether respondent intentionally and falsely answered no to the question and to find that the Administrator met his burden of proof on this point.[6]

Respondent also appears to argue that the law judge's credibility determination against respondent is against the weight of the evidence. As is clear from the above discussion, we disagree. It is, of course, plausible that, as respondent suggests (Appeal at 6), he had the honest yet mistaken belief that he had no record of a conviction (Appeal at 6). However, that an alternative conclusion is plausible is not a proper basis

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[5] See Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (elements of intentional falsification are: (1) a false representation; (2) in reference to a material fact; and (3) made with knowledge of its falsity).

[6] For example, respondent testified that, although he had pled guilty to the possession charge, although his sentence had been reduced from 10 years to a 30-day jail term and a lengthy probation, and although he could recall no specific advice to this effect, he did not believe he had a record. He further testified that he did not check with his lawyer in the criminal case or the court to determine his status, and that he knew the effect a conviction would have on his employment potential. (At the time of the hearing, respondent had a commercial pilot certificate and was a corporate pilot for a law firm.) See also footnote 4, supra, and the law judge's questioning, Tr. at 45-51.

for overturning the law judge's credibility finding when other evidence supports that finding and it is not incredible, arbitrary, or capricious. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1987); and Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988).

Finally, respondent contends that United States v. Manapat, 928 F.2d 1097 (11th Cr. 1991), forecloses any certificate action that is based on the incorrect marking of ¶ 21w of the medical application.[7] Respondent nevertheless recognizes that we have held otherwise,[8] and fails to convince us that the particular facts of this case warrant dismissal on the grounds that the form was ambiguous. Moreover, Manapat is not relevant to the extent that respondent's testimony was **not** that he found the question or the application form confusing or ambiguous, but that he believed his conviction had, in effect, been expunged and for that reason did not answer "yes" on the form.

[7]In Manapat, the court found that the placement of questions regarding traffic and other convictions (¶ 21v and 21w) in a section otherwise dealing with medical issues made the application ambiguous and confusing and that an individual's incorrect answers on that form could, therefore, not be the basis for a criminal prosecution.

[8]See Administrator v. Barghelame and Sue, NTSB Order EA-3430 (1991), and Administrator v. Sue, NTSB Order EA-3877 (1993). In both decisions, we noted our belief that the questions at issue should not be confusing to a person of ordinary intelligence, despite their placement.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. Revocation of respondent's medical certificate and 60-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[9]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[9]For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).